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6 **UNITED STATES DISTRICT COURT**  
7 **DISTRICT OF NEVADA**  
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9 CHRIS DAVENPORT,

10 Plaintiff,

11 v.

12 BANK OF AMERICA, N.A., *et al.*,

13 Defendants.  
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Case No. 2:11-CV-00686-KJD-CWH

**ORDER**

15 Presently before the Court is Plaintiff's Motion to Remand (#13). Defendants filed a  
16 response in opposition (#21). Also before the Court is Defendants' Motion to Dismiss and Expunge  
17 Lis Pendens (#6). Plaintiff filed a response in opposition (#14) to which Defendants replied (#19).

18 **I. Motion to Remand**

19 Plaintiff asserts that the action should be remanded because his complaint does not state a  
20 federal cause of action on the face of the complaint, and because Defendants failed to unanimously  
21 notify the court of their intention to consent to removal. Plaintiff also argues that the Court should  
22 abstain from hearing this action.

23 However, the record clearly demonstrates that diversity jurisdiction exists in this action.  
24 Plaintiff is a citizen of the state of Nevada and Defendants are all citizens of other states. It is also  
25 undisputed that the amount in controversy exceeds \$75,000.00. Furthermore, it is undisputed that all  
26 Defendants are jointly represented and timely joined in the notice of removal. Finally, Plaintiff has

1 not met his heavy burden in demonstrating that the Court should abstain from hearing this action.  
 2 Therefore, removal was proper and Plaintiff's motion to remand is denied.

### 3 II. Motion to Dismiss

4 Plaintiff filed a nearly identical lawsuit ("the 2010 lawsuit") involving the same property,  
 5 same loan, same deed of trust, and same defendants in 2010 which was dismissed by this court on  
 6 November 19, 2010. See Davenport v. Bank of America, N.A., 2:09-cv-1609-PMP-RJJ. When the  
 7 *lis pendens* in that action was expunged and a new Notice of Sale was sent to Plaintiff and recorded,  
 8 he filed the present action in state court which was subsequently removed to the present Court. It  
 9 listed essentially, though expressed slightly differently, the same twelve causes of action present in  
 10 the 2010 lawsuit. The two new claims, statutorily improper foreclosure and "broken chain of  
 11 custody", could have been brought in the 2010 lawsuit. Defendants have now moved to dismiss the  
 12 present case on grounds of res judicata.

13 "Res judicata, also known as claim preclusion, bars litigation of claims in a subsequent action  
 14 that were raised or could have been raised in the prior action." Oregon Natural Desert, 2008 WL  
 15 140657 \*3, citing Owens v. Kaiser Fund Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 2001). To  
 16 trigger the doctrine of res judicata, the earlier suit must have (1) involved the same "claim" or cause  
 17 of action as the later suit, (2) reached a final judgment on the merits, and (3) involved identical  
 18 parties or privies. Mpoyo v. Litton Electro-Optical Systems, 430 F.3d 985, 987 (9th Cir. 2005)  
 19 (citation omitted). In this action, all three prongs necessary for the assertion of res judicata are  
 20 present. This action involves the exact same facts as the 2010 lawsuit, the 2010 lawsuit reached a  
 21 final judgment on the merits, and it involves identical parties. Therefore, the Court must grant  
 22 Defendants' motion to dismiss.<sup>1</sup>

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 24 <sup>1</sup>The Court notes that in opposition to the motion to dismiss Plaintiff merely reiterated boilerplate arguments that  
 25 he stated a claim on the face of his complaint and that he is entitled to discovery. Plaintiff made no response to the  
 26 argument that his claims are foreclosed by res judicata. Therefore, Defendants are entitled to dismissal under Local Rule  
 7-2(d) which allows the court to construe Plaintiff's failure to address Defendants' motion as consent to the granting of  
 the motion.

1 Plaintiff is warned that if he continues to assert the same claims that have now been  
2 dismissed twice, he will be subject to sanctions under the Court's inherent authority by this Court or  
3 the court in any subsequent action should he choose to file the same action a third time.

4 III. Conclusion

5 Accordingly, IT IS HEREBY ORDERED that Plaintiff's Motion to Remand (#13) is  
6 **DENIED**;

7 IT IS FURTHER ORDERED that Defendants' Motion to Dismiss and Expunge Lis Pendens  
8 (#6) is **GRANTED**;

9 IT IS FURTHER ORDERED that all other outstanding motions are **DENIED as moot**;

10 IT IS FURTHER ORDERED that the Clerk of the Court enter **JUDGMENT** for Defendants  
11 and against Plaintiff.

12 DATED this 13<sup>TH</sup> day of October 2011.

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16 Kent J. Dawson  
17 United States District Judge  
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